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CPLR 3017(a): Fiduciary Relationship Necessary fo an Accounting

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submitted that a litigant, who wishes to avail himself of relief under CPLR 3012, should promptly reject pleadings which are served late.[91]

CPLR 3017(a): Fiduciary relationship necessary for an accounting.

It is well-established that an action for an accounting will not lie, unless a fiduciary relationship between plaintiff and defendant is first shown.[92] In a recent decision, *Kaminsky v. Kahn*,[93] the Court of Appeals reversed the appellate division, first department,[94] and held that a fiduciary relationship is still required before an accounting will lie.

The action arose out of a complicated stock transfer transaction, which culminated in a contract for the sale of stock from plaintiff to defendant. By the terms of the agreement, plaintiff was given an option to purchase on the same terms as defendant's offer to third parties. In the event the securities were sold to a third person, plaintiff was to receive one third of the net proceeds of the sale; however, as long as defendant held the stock, his interest was subject to plaintiff's continuing right to one third of any dividends declared.

In an action at law for breach of contract, plaintiff sought to hold the defendant accountable for certain stock sold without plaintiff's knowledge. The appellate division held that an accounting was proper under the circumstances, and that:

> the right of the plaintiff to judgment is not to be foreclosed upon the narrow ground, urged by the defendant, that the agreement between the parties did not create a fiduciary relationship and that, therefore, the plaintiff is not entitled to an accounting. The question instead is, did the plaintiff, on the basis of the allegations of his pleadings, establish a right to any relief at the hands of the court, and . . . were the directions for an accounting and the . . . judgment proper.[95]

It was found that an accounting was proper in light of the trend to effectuate the statutory abolishment of distinctions be-

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[91] *See* Graziano v. Albanese, 24 App. Div. 2d 712, 263 N.Y.S.2d 20 (1st Dep't 1965).

[92] *E.g.*, Schantz v. Oakman, 163 N.Y. 148, 156-57, 57 N.E. 288, 289 (1900); Brigham v. McCabe, 27 App. Div. 2d 100, 105, 276 N.Y.S.2d 328, 333 (3d Dep't 1966), *aff'd*, 20 N.Y.2d 525, 232 N.E.2d 327, 285 N.Y.S.2d 294 (1967); Silverman v. Bob, 253 App. Div. 303, 305, 2 N.Y.S.2d 121, 123 (1st Dep't 1938).

[93] 20 N.Y.2d 573, 232 N.E.2d 837, 285 N.Y.S.2d 833 (1967).

[94] 27 App. Div. 2d 248, 277 N.Y.S.2d 968 (1st Dep't 1967).

[95] 23 App. Div. 2d 231, 236, 259 N.Y.S.2d 716, 721 (1st Dep't 1965).

tween suits at law and in equity,[96] and in light of the broad powers afforded our courts to grant any type of relief justifiable, under CPLR 3017.[97] Moreover, the procedural advantages of an accounting in the situation posed by the transaction appeared to be clear.

In view of the peculiar appropriateness of the fact situation, the decision of the Court of Appeals, to deny an accounting, appears to be unfortunate.

ARTICLE 31 — DISCLOSURE

CPLR 3101(a): Court of Appeals interprets "material and necessary."

CPLR 3101(a) mandates that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action. . . ." The spirit with which the words "material and necessary" are to be construed has been demonstrated by the Court of Appeals in *Allen v. Crowell-Collier Publishing Co.*,[98] wherein it has endorsed the liberal interpretation given 3101(a) by various lower courts.[99] The test as to what is "material and necessary" when disclosure is sought is, in the words of the Court, one of "usefulness and reason."[100]

In approving an extremely liberal construction of CPLR 3101(a) the Court has adopted what practice commentators have strenuously urged.[101] The *Allen* case reflects a new philosophy of litigation which scorns stingy pre-litigation practice. Hopefully, lower courts, cognizant of the *Allen* case, will think in negative

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[96] CPLR 103(a), provides:
"One form of action. There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished."

[97] CPLR 3017(a), provides, *inter alia*:
"[T]he court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just."

[98] 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968). In *Allen*, plaintiffs brought a class action for severance pay. Plaintiffs sought answers to certain interrogatories concerning defendant's retirement and severance pay procedures, and practices at its other offices and plants. The lower courts sustained a motion to strike these interrogatories.

[99] Rios v. Donovan, 21 App. Div. 2d 409, 250 N.Y.S.2d 818 (1st Dep't 1964); West v. Aetna Cas. & Sur. Co., 49 Misc. 2d 28, 266 N.Y.S.2d 600 (Sup. Ct. Onondaga County 1965). *See The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 303, 304, 305 (1966).

[100] 21 N.Y.2d at 406, 235 N.E.2d at 432, 288 N.Y.S.2d at 452.

[101] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 3101.04, 3101.07, 3101.08 (1966); *see also* 7B McKINNEY'S CPLR 3101, supp. commentary 14-19 (1967).